

signal creation, processing, transmission, and display -- is precisely the type of innovation-stifling action Congress instructed the Commission to avoid.

Moreover, the Commission previously has admitted that the imposition of a digital broadcasting transmission standard on cable and other media would be both unnecessary<sup>51</sup> and would stifle innovation and competition.<sup>52</sup> It has also consistently relied on the marketplace to set standards for rapidly changing and nascent telecommunications technologies such as PCS, DBS, MMDS, and DARS.<sup>53</sup> In each of these instances, the Commission concluded that, in an emerging and rapidly changing technological environment, adopting technical standards was both inefficient and inappropriate.<sup>54</sup> For example, after noting the differing and

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<sup>51</sup> See Tentative Decision and Further Notice of Inquiry, 3 F.C.C.R. 6520, at ¶ 133 (1988) ("ATV compatibility among alternative media may develop in an appropriate manner without government involvement").

<sup>52</sup> See id. See also Advanced Television Systems and Their Impact on the Existing Television Broadcast Service, Notice of Inquiry, 2 F.C.C.R. 5125, ¶ 97 (1987) ("we are ... mindful of the benefits that could come about through improvements made subsequent to the establishment of standards and do not wish to foreclose these possibilities").

<sup>53</sup> See Notice at ¶ 36.

<sup>54</sup> See PCS Second Report and Order, 8 F.C.C.R. 7700, at ¶ 137 (1993) (finding that the imposition of a technological framework at a developmental stage would stifle the introduction of new technology); Amendment of Subpart C of Part 100 of the Commission's Rules and Regulations Regarding Technical Standards for the Direct Broadcast Satellite Service, Report and Order, 60

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changing technologies being developed in the DBS area, the Commission concluded that:

[I]n view of the controversy and contradiction raised in the comments, the Commission ... believes that only actual operating experience will prove which of the various technical approaches are most feasible. In view of this, it is inappropriate to adopt standards ... [T]he Commission continues to believe that industry groups provide the appropriate mechanism for study and resolution of technical issues at this stage of development.<sup>55</sup>

Similarly, in the MMDS context, the Commission refused to adopt a mandatory standard, stating, "We do intend, when possible, to accommodate the widest possible voluntary usage of this or any other technology" in order to attain the highest efficiencies.<sup>56</sup>

The same reasons which dictated the Commission's decisions not to adopt transmission standards for DBS, PCS, MMDS, and DARS are present in this context. As noted, MVPDs are undergoing intense change and innovation. Moreover, digital video

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R.R.2d (P&F) 1539, at ¶¶ 7, 11 (1986) ("DBS Order"); Private Operational-Fixed Microwave Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service, and Cable Television Relay Service, 5 F.C.C.R. 6410, at ¶ 47 (1990) ("MMDS Order"); Establishment and Regulation of New Digital Audio Radio Services, Notice of Proposed Rulemaking and Further Notice of Inquiry, 7 F.C.C.R. 7776, at ¶ 14 (1992) (declining to impose a transmission standard at the developmental stage).

<sup>55</sup> DBS Order, 60 R.R.2d (P&F) 1539, at ¶¶ 7, 11.

<sup>56</sup> MMDS Order, 5 F.C.C.R. 6410, at ¶ 47.

technology is in its infancy, and there is no way to predict which services, equipment, or technologies the consumer will prefer.<sup>57</sup> As with MMDS, DBS, PCS, and DARS, the Commission should refrain from retarding market choices by imposing unnecessary government standards at this crucial stage of development.

Not only should the Commission refrain from directly imposing a digital transmission standard on MVPDs; it must also avoid imposing such a standard indirectly as well. This could happen, for example, if the Commission forces the costs of compatibility to be borne by any MVPD that is using a technology standard that is inconsistent with that of another MVPD. Such an approach could tend to force one MVPD to use the standard of another MVPD, even though it might be inferior for subscribers, rather than incur the costs of compatibility. Indirectly imposing a standard in this manner would be impermissible under the 1996 Act<sup>58</sup> and would have the same adverse effects on innovation and efficiency as an express standard.

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<sup>57</sup> See Notice at ¶ 33 ("Digital broadcasting is in its infancy and further advances are likely to occur."); Tentative Decision and Further Notice of Inquiry, 3 F.C.C.R. 6520, ¶ 133 (1988) (the imposition of transmission standards at an early stage of development would retard innovation and competition).

<sup>58</sup> Clearly the Commission cannot circumvent the anti-standards provisions of the 1996 Act by engaging in standard setting through indirect means. See Toll v. Moreno, 458 U.S. 1, 16 (the government may not achieve through indirect means that which it

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## CONCLUSION

Based on the foregoing, TCI respectfully urges the Commission not to impose a digital transmission standard on broadcasters or non-broadcast MVPDs. Not only is government-imposition of the standard prohibited by the 1996 Act and Commission precedent (as well as unnecessary for broadcasters given the apparent industry consensus on the ATSC standard), it would also stifle innovation in the highly dynamic MVPD marketplace and delay the conversion to digital video technology.

Respectfully submitted,

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is expressly barred from doing); Writers Guild of America West, Inc. v. F.C.C., 423 F. Supp. 1064, 1150 (D.D.C. 1976) (since the Commission is to be prohibited from censorship, any suggestion that the Commission may indirectly accomplish the same ends through the licensing process "must be and is categorically rejected.").